UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KLAMATH WATER USERS PROTECTIVE ASSOCIATION; Klamath Drainage District; Sam Henzel; Henzel Properties, Ltd., Plaintiffs-counter-defendants-Appellants,

v.

Roger PATTERSON, Regional Director, Mid-Pacific Region, U.S. Bureau of Reclamation; Karl E. Wirkus, Area Manager, Klamath Irrigation Project, U.S. Bureau of Reclamation; Eluid Martinez, Commissioner of Reclamation, U.S. Department of the Interior; Patricia Beneke, Assistant Secretary for Water and Science, U.S. Department of the Interior; Bruce Babbitt, Secretary of the Interior; The United States Bureau of Reclamation; United States of America, Defendants-Appellees,

and

PacifiCorp, Defendant-counter-claimant-Appellee,

and

Northcoast Environmental Center; Pacific Coast Federation of Fishermens Association; Institute for Fisheries Resources; Klamath Forest Alliance; Mazamas; Oregon Natural Resources Center; The Wilderness Society; Waterwatch of Oregon; Yurok Tribe, Defendant-Intervenors-Appellees.

No. 98-35708.

Filed Sept. 9, 1999
Amended Jan. 28, 2000

Before: FLETCHER, FERGUSON, and TASHIMA, Circuit Judges.

ORDER

The opinion filed September 9, 1999, is amended by adding a new footnote 3 at the end of Part II.B.3, slip op. at 11169, 191 F.3d at 1123, as follows:

3. An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

With this amendment, the panel has voted to deny appellants' petition for panel rehearing. Judge Tashima votes to deny the petition for rehearing en banc and Judges B. Fletcher and Ferguson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R.App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

OPINION

TASHIMA, Circuit Judge:

This appeal involves a basic contract issue: whether the Klamath Water Users Protective Association and other irrigators in the Klamath Basin (collectively, the "Irrigators") are third-party beneficiaries to a 1956 contract (the "Contract") between the United States Bureau of Reclamation ("Reclama-

tion" or "United States") and the California Oregon Power Company ("Copco") that governs the management of the Link River Dam (the "Dam") in the Klamath Basin (the "Project"). We hold that they are not. The district court concluded that the Irrigators do not have third-party beneficiary water rights under the Contract. It granted a declaratory judgment to Reclamation and PacifiCorp, Copco's successor in interest that now operates and maintains the Dam under the Contract, holding that PacifiCorp is not liable to the Irrigators for implementing Reclamation's water allocation decisions for the Project. *See Klamath Water Users Ass'n v. Patterson*, 15 F. Supp.2d 990, 997 (D.Or. 1998) ("*Klamath*"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. Background

The Project, located within the Upper Klamath and Lost River Basins in Oregon and California, was authorized by Congress in 1905 pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (1902). In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.

In 1917, the United States and Copco entered into an agreement under which Copco would construct the Dam and then convey it to the United States. In return, Copco and the United States entered into a fifty-year contract (1917-1967) that gave Copco the right to operate the Dam. The Contract was amended in 1920 and 1930, and was renewed in 1956 for an additional fifty years (1956-2006). The United States and Copco are the only named parties to the Contract. The Contract, as renewed in 1956, remains in effect and is the subject of controversy here. The Contract states that it was entered into pursuant to the Reclamation Act and "acts of Congress relating to the preservation and development of fish and wildlife resources."

The parties do not dispute that the Dam was built to help the United States satisfy its contractual obligations to water users in the basin, including the Irrigators. However, the project served other federal purposes, such as impounding water to flood the adjacent wildlife refuges. Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from the Dam.

Operation of the Dam is also subject to the requirements of federal statutes, such as the Endangered Species Act ("ESA.") The coho salmon of the lower Klamath River has been listed as threatened, and two species of sucker fish, the Lost River and shortnose suckers, located in and around the Project, are listed as endangered. In 1992, the United States Fish and Wildlife Service issued a Biological Opinion that required certain minimum elevations for Upper Klamath Lake to avoid jeopardizing these protected species. In addition, the Secretary of the Interior has recognized that a number of Oregon tribes, including the Klamath, Yurok and Hoopa Valley tribes (the "Tribes"), hold fishing and water treaty rights in the basin.

In recognition of the federal government's various obligations related to the Project, Reclamation initiated a public process to establish a new operating plan for the Dam. For the next several years, Reclamation intends to issue one- year interim plans while formulating a long term plan for water distribution. Pursuant to this policy, in April, 1997, Reclamation circulated to interested parties a draft of its proposed 1997 interim plan for the Project. In May, 1997, Reclamation issued its final 1997 interim plan. Soon thereafter, PacifiCorp stated it would not implement the plan because the required flow levels would force it to violate its Federal Energy Regulatory Commission ("FERC") license. PacifiCorp's FERC license required FERC flows[1] in September at 1,300 cubic feet per

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[1] "FERC" flows refer to certain minimum flows for fish downstream. A FERC license regulates FERC flows.

second ("cfs"), while Reclamation's 1997 plan allowed for only 1,000 cfs.

Reclamation and PacifiCorp agreed upon a short-term modification to the Contract. The modification directed PacifiCorp to implement the 1997 plan, contingent upon FERC concurrence. The Irrigators were not included in the negotiations that led to this modification.

The Irrigators filed this action claiming, among other things, breach of the Contract based on their alleged third-party beneficiary status. In response, PacifiCorp filed a counterclaim, seeking a declaration of rights with respect to the Irrigators' standing under the Contract. The parties then filed cross-motions for summary judgment.

The district court denied the Irrigators' motion for summary judgment and granted PacifiCorp's and Reclamation's motions for summary judgment on PacifiCorp's counterclaim. *See Klamath*, 15 F. Supp.2d at 997. The Irrigators appeal.

II. Discussion

A. Third Party Beneficiaries

The Irrigators argue that under the plain language of the Contract, they are third-party beneficiaries and thus entitled to enforce the Contract's existing terms. We review the district court's grant of summary judgment de novo. *See Tri-State Dev. v. Johnston*, 160 F.3d 528, 529 (9th Cir. 1998). Because the facts are not in dispute, the only question we must decide is whether the district court correctly applied the relevant law in concluding that the Irrigators are not third-party beneficiaries under the Contract. *See id.* The interpretation of a contract is a mixed question of law and fact subject to de novo review. *See O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995). In particular, the determination of whether contract language is ambiguous is a question of law. *See id.*

Federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *See id.* For guidance, we look to general principles for interpreting contracts. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). Before a third party can recover under a contract, it must show that the contract was made for its direct benefit—that it is an intended beneficiary of the contract. *See Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979).

A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. *See Kennewick*, 880 F.2d at 1032. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1549 (9th Cir. 1989). Whenever possible, the plain language of the contract should be considered first. *See Textron Defense Sys. v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998); *Leicht v. Bateman Eichler, Hill Richards, Inc.*, 848 F.2d 130, 133 (9th Cir. 1988). The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation. *See Kennewick*, 880 F.2d at 1032.

When distinguishing between intended and incidental beneficiaries, the Restatement of Contracts explains:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1979) ("Restatement").

To sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party.[2] *See Montana v. United States*, 124 F.3d 1269, 1273 (Fed.Cir. 1997). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract. *See id.* One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her. *See* Restatement § 302(1)(b) cmt. d.

Parties that benefit from a government contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. *See* Restatement § 313(2). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Id.* cmt. a.

The Irrigators derive their alleged intended beneficiary status from Articles 2 and 6 of the Contract. Article 2 provides, in pertinent part:

> Copco shall operate and maintain for a period of fifty (50) years from the effective date hereof . . . Link River Dam, hereby constructed by Copco and transferred to the United

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[2] A promisor owes a duty of performance to any intended beneficiary of the promise, and "the intended beneficiary may enforce the duty," Restatement § 304, whereas an incidental beneficiary acquires "no right against the promisor or the promisee." *Id.* § 315.

> States pursuant to the agreement of February 24, 1917. Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137 . . . *Provided*, that the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in order to protect the irrigation and reclamation requirements of Project Land. . . .

Article 6 provides in pertinent part:

> Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake. No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land: *Provided*, That nothing in this agreement shall curtail or interfere with the water rights of Copco having a priority earlier than May 19, 1905. . . .

The plain language of the Contract is sufficient to rebut the contention that the Irrigators are intended third-party beneficiaries. Neither Article 2 nor Article 6 illustrates an intention of Copco or the United States to grant the Irrigators enforceable rights. The Irrigators argue that the language of Article 2 contains such an intention because it allows Copco to go below the minimum elevation level only "in order to protect the irrigation and reclamation requirements of Project Land." This sentence, however, does not manifest an intention to give third-party beneficiary rights to the Irrigators; rather, it grants discretion to the United States, through the person of the Contracting Officer, to enforce the Contract by taking control of the Dam.

The Irrigators also invoke Article 6 to prove their intended beneficiary status. They rely on the phrase stating that Copco

may not use water "when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land." This phrase, however, simply preserves the United States' ultimate control over the Dam and its operations. It does not confer rights on the Irrigators. *See Norse v. Henry Holt & Co.*, 991 F.2d 563, 568 (9th Cir. 1993) (holding that contract provisions preventing interference with existing rights do not turn holders of such rights into third-party beneficiaries).

Additionally, the recitation of constituencies whose interest bear on a government contract does not grant these incidental beneficiaries enforceable rights. Vague, hortatory pronouncements in the Contract, by themselves, are insufficient to support the Irrigators' claims that the United States and Copco intended to assume a direct contractual obligation to every domestic, municipal, or irrigation water user. *See Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1320 (9th Cir. 1996).

Examination of the contract as a whole illustrates that it was intended to benefit only the contracting parties. Article 15 provides:

> This contract binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder.

This language clearly evinces the intent of the parties to limit intended beneficiaries to the contracting parties. The language "any water user's organization or similar group" does not give the Irrigators any rights besides those of incidental beneficiaries, because they have not succeeded, either by assignment or operation of law, to the rights of the United States. Although the Contract operates to the Irrigators' benefit by impounding irrigation water, and was undoubtedly

entered into with the Irrigators in mind, to allow them intended third-party beneficiary status would open the door to all users receiving a benefit from the Project achieving similar status, a result not intended by the Contract. Accordingly, we hold that the Irrigators are not intended third-party beneficiaries.

B. Declaratory Judgment

The Irrigators also appeal the district court's grant of summary judgment for PacifiCorp on its amended counterclaim and adoption of its requested declarations. The district court held that:

> (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project.

Klamath, 15 F. Supp.2d at 996-97. We review de novo a decision to grant declaratory relief. *See Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996).

1. Control of the Dam

The Irrigators argue that only PacifiCorp, and not Reclamation, has the right to control the storage and release of water, and thus the district court erred in granting PacifiCorp immunity from suit for implementing Reclamation's water allocation decisions. The Contract, however, evinces the unmistakable intent that Reclamation controls the Dam. The preamble of the Contract states that the United States is "engaged in the reclamation and irrigation of lands" in the Klamath Project, and is "preparing plans for the development of water and related resources." As noted above, Article 2

dictates that while Copco "shall operate and maintain . . . Link River Dam" at certain water levels, PacifiCorp's decisions are subject to being overridden by Reclamation's "Contracting Officer." Article 6 states that "Nothing in this agreement shall curtail or in anywise be construed as curtailing the rights of the United States to Klamath Water or to the lands along or under the margin of Upper Klamath Lake." In fact, the only part of the Contract reserving any specific rights to Copco is Article 8, which provides that "[n]othing in this agreement shall be deemed to confer on the United States or upon any of its successors any right to the use of Klamath Water for the purpose of generating electric power."

In sum, the Contract makes clear that the United States retains overall authority over decisions on use of Project water. Accordingly, we hold that the district court did not err in granting PacifiCorp immunity from suit in implementing Reclamation's 1997 plan, as PacifiCorp does not control the Dam.

2. Endangered Species Act

The Irrigators claim PacifiCorp does not have a legal duty to operate the Dam to meet its ESA obligation. The district court held that the Irrigators' rights to water are subservient to the ESA. *See Klamath*, 15 F. Supp.2d at 995.

It is well settled that contractual arrangements can be altered by subsequent Congressional legislation. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *O'Neill*, 50 F.3d at 686. The ESA was enacted in 1973 to "halt and reverse the trend toward species extinction, whatever the cost." *See O'Neill*, 50 F.3d at 681 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184, (1978)). Even in circumstances where the ESA was passed well after the agreement, the legislation still applies as long as the federal agency retains some measure of control over the activity. *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995). Therefore, when

an agency, such as Reclamation, decides to take action, the ESA generally applies to the contract. *See Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1125 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 1754 (1999).

Because Reclamation retains authority to manage the Dam, and because it remains the owner in fee simple of the Dam, it has responsibilities under the ESA as a federal agency. These responsibilities include taking control of the Dam when necessary to meet the requirements of the ESA, requirements that override the water rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct Dam operations to comply with the ESA.

3. Indian Water Rights

The Irrigators aver that the existence of the Tribes' senior water rights are irrelevant to the current dispute, and that the district court's conclusion that the Tribes have senior water rights should be vacated. The district court found that the Irrigators' water rights were subservient to senior tribal water rights. *See Klamath*, 15 F. Supp.2d at 996.

Similar to its duties under the ESA, the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408-11, 1415 (9th Cir. 1983) (holding that the Klamath Basin Tribes hold implied water rights to support hunting and fishing rights guaranteed by treaties between Tribes in Oregon and California and United States). Only Congress can abrogate Indian treaty rights, *see United States v. Dion*, 476 U.S. 734, 738 (1986), and it has not done so here.

We have held that water rights for the Klamath Basin Tribes "carry a priority date of time immemorial." *Adair*, 723 F.2d at 1414. Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any

alleged rights of the Irrigators. Accordingly, we hold that the district court did not err in concluding that Reclamation has the authority to direct operation of the Dam to comply with Tribal water requirements.[3]

III. Conclusion

Under the plain language of the 1956 Contract between Copco and Reclamation, the Irrigators do not possess third-party beneficiary water rights. Accordingly, the district court's grant of summary judgment to Reclamation and PacifiCorp is

AFFIRMED.

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[3] An adjudication of all of the rights to the use of the surface waters of the Klamath River Basin ("Basin"), within the State of Oregon, is now pending in state court. *See United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). That is a comprehensive water rights adjudication contemplated by the McCarran Amendment, 43 U.S.C. § 666, and questions of relative amounts and priorities, at least within the State of Oregon, will be decided there. Our decision in this case and that of that district court relate only to questions involving the Bureau's operation and management of the Project, and not to the relative rights of others not before the court to the use of the waters of the Basin.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH WATER USERS ASSOCIATION, et al., Plaintiffs,
v.
ROGER PATTERSON, Director, Bureau of Reclamation, PacifiCorp, et al., Defendants.

No. Civ. 97-3033-HO.

April 27, 1998.

ORDER

HOGAN, District Judge.

The central issue before the court is whether plaintiffs are third party beneficiaries to the 1956 contract between PacifiCorp (formerly Copco) and the Bureau of Reclamation (Reclamation) regarding the operation of the Link River Dam located at the outlet of Upper Klamath Lake in Southwest Oregon.

Plaintiffs filed this action on June 4, 1997, alleging four claims. This court subsequently denied plaintiff's motion for injunctive relief, granted Reclamation's motion for summary judgment on plaintiffs' National Environmental Policy Act (NEPA) claim, and, by stipulation, dismissed plaintiffs' remaining claims without prejudice.

PacifiCorp's amended counterclaim is the sole remaining substantive matter before the court. The counterclaim seeks a declaration of plaintiffs' rights under the 1956 contract [# 147].

BACKGROUND

The Klamath Project, located within the Upper Klamath and Lost River Basins in Oregon and California, was authorized by Congress in 1905 pursuant to the Reclamation Act of 1902 (32 Stat. 388). In 1905, in accordance with state water law and the Reclamation Act, the United States appropriated all available water rights in the Klamath River and Lost River and their tributaries in Oregon and began constructing a series of water diversion projects.

In 1917, the United States and Copco entered into an agreement under which Copco would construct the Link River Dam and then convey the dam to the United States. In return, Copco and the United States entered into a fifty-year contract (1917-1967) which gave Copco the right to operate the dam. The contract was amended in 1920 and 1930, and was renewed in 1956 for an additional fifty years (1956-2006). The 1956 renewal of the Link River Dam contract remains in effect and is the subject of dispute here.

The 1956 contract states it was entered into pursuant to the Reclamation Act and "acts of Congress relating to the preservation and development of fish and wildlife resources." Federal Defendants' Memorandum in Support of Motion for Summary Judgment on Defendant PacifiCorp's Counterclaim [# 163], Exhibit 1, p. 1.

Article 6 of the 1956 contract, highlighted by plaintiffs, states:

> No Klamath Water shall be used by Copco when it may be needed or required by the United States or any irrigation or drainage district, person, or association obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land. . . .

Id. at p. 5.

Article 15 of the 1956 contract, relied upon by defendants, states the contract:

> binds and inures to the benefit of the parties hereto, their successors and assigns, including without limitation any water users' organization or similar group which may succeed either by assignment or by operation of law to the rights of the United States hereunder.

Id. at 8. The United States and Copco are the only named parties to the 1956 contract. The United States has not assigned any of its rights under the 1956 contract to any water users' organization, nor has any such organization succeeded to those rights.

The 1956 contract also states:

> Copco may regulate the water level of Upper Klamath Lake between the elevations 4143.3 and 4137, . . . except at such times, and on such conditions, as may be satisfactory to the Contracting Officer [the United States]: Provided, That the Contracting Officer from time to time may specify a higher minimum elevation than 4137 if in his opinion such must be maintained in order to protect the irrigation and reclamations requirements of Project Land.

Id. at p. 3.

Since completion of the Klamath project, Reclamation and water users in the basin have entered into over 250 water delivery contracts, also called repayment contracts. The vast majority of these repayment contracts provide:

> On account of drought, canal breaks, inaccuracy in distribution, or other causes, there may occur at times a shortage in the water supply provided for herein for lands of the District and, while the United States will use all reasonable means to guard against such shortages, in no event shall any liability accrue against the United States . . . for any damages, direct or indirect, arising therefrom. . . .

Declaration of Karl Wirkus [# 163] Ex. B, pp. 12-13.

It is not disputed that Reclamation arranged for Link River Dam to be built in significant part to help it satisfy its contractual obligations to water users in the basin, such as plaintiffs. However, the project served other federal purposes, such as impounding water to flood the adjacent wildlife refuges. Copco's interest related primarily to controlling the flow of water to the Copco-owned hydroelectric facilities downstream from Link River Dam. In 1961, the Federal Energy Regulatory Commission required Copco to release water from Link River Dam to provide certain minimum flows for fish downstream (called "FERC" flows).

Operation of Link River Dam is also subject to the requirements of federal statutes, such as the Endangered Species Act. The coho salmon of the lower Klamath River has been listed as threatened and two species of sucker fish, the Lost River and shortnose suckers, located in and around the Klamath Project, are listed as endangered. In 1992, the United States Fish and Wildlife Service issued a Biological Opinion that required certain minimum elevations for Upper Klamath Lake to avoid jeopardy to protected species.

In addition, the Secretary of Interior has recognized that a number of tribes, including the Klamath, Yurok and Hoopa Valley tribes, hold fishing and water treaty rights in the basin. These rights appear to have a priority date of either "time immemorial" or the date of the respective treaties, making them senior to any water rights obtained by the United States or irrigators in the Klamath Project. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir. 1984).

In recognition of the federal government's various obligations related to the Klamath Project, Reclamation initiated a public process to establish a new operating plan for the Klamath Project. According to representations made to the court during oral argument in this matter, for the next several

years, Reclamation intends to issue one-year interim plans while formulating a long term plan.

Pursuant to this policy, on April 25, 1997, Reclamation circulated to interested parties, a draft of its proposed 1997 interim plan for the Klamath Project. On May 1, 1997, Reclamation issued its final 1997 interim plan. Soon after, PacifiCorp stated it would not implement the plan because the required flow levels would force it to violate its FERC license. PacifiCorp's FERC license required FERC flows in September at 1,300 cubic feet per second (cfs), while Reclamation's 1997 plan allowed for only 1,000 cfs.

Irrigation groups were aware that PacifiCorp and Reclamation were attempting to negotiate a resolution of this impasse. On June 2, 1997, at the irrigators' request, PacifiCorp attorneys met with members of the irrigation community to discuss implementation of the 1997 plan and the 1956 contract. Large portions of the meeting were tape recorded by members of the irrigation community and later transcribed.

On June 3, 1997, Reclamation and PacifiCorp agreed upon a short-term modification to the 1956 contract. The modification directed PacifiCorp to implement the 1997 plan, contingent upon FERC concurrence. Plaintiffs were not included in the negotiations that led to this modification.

On June 4, 1997, plaintiffs filed this action seeking a temporary restraining order and alleging four claims, including a claim for breach of the 1956 contract based on their third party beneficiary status.

On June 17, 1997, this court denied plaintiff's motion for a temporary restraining order [# 40]. PacifiCorp filed a counter-claim on July 7, 1997, seeking a declaration of rights with respect to plaintiffs' standing under the 1956 contract [# 60]. On July 29, 1997, following briefing and oral argument, the

court granted Reclamation's motion for summary judgment on plaintiffs' NEPA claim [# 132].

On September 25, 1997, plaintiffs moved for voluntary dismissal without prejudice of their remaining three claims [# 137, 139]. Pursuant to stipulation of the parties, the court granted dismissal of plaintiffs' claims without prejudice on the condition that Reclamation be joined as a necessary party to PacifiCorp's counterclaim [è 146, 148]. PacifiCorp filed an amended counterclaim [# 147] on October 29, 1997.

Now before the court are the parties' cross motions for summary judgment and to dismiss defendant PacifiCorp's First Amended Counterclaim [è 151, 154, 161, 164]. Also before the court is defendant PacifiCorp's motion to strike reference to the tape recorded transcript of the pre-litigation meeting between irrigators and PacifiCorp attorneys [# 200].

DISCUSSION

1. Standard:

Summary judgment is appropriate if the court finds there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). There is no genuine issue of material fact where the nonmoving party fails "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989).

All reasonable doubts as to the existence of genuine issues of fact must be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). The inferences drawn from underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment

is not appropriate. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) will only be granted when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). It is improper to inquire into the adequacy of the evidence when deciding whether to dismiss for failure to state a claim. *Yamaguchi v. United States Dept. of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997), citing *Campanelli v. Bockrath*, 100 F.3d 1476, 1484 (9th Cir. 1996). Instead, "the court must accept as true the plaintiff's allegations contained in the complaint and view them in the light most favorable to [plaintiff]." *Id.* citing *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974).

2. Declaratory Relief:

Declaratory relief is appropriate if a judgement will clarify and settle the legal relationships in question and if it will relieve uncertainty giving rise to the controversy. *Natural Resources Defense Council v. EPA*, 966 F.2d 1292, 1299 (9th Cir. 1992). Defendant PacifiCorp asserts declaratory judgment is appropriate here to resolve the uncertainty surrounding current negotiations between it and Reclamation regarding the 1956 Link River Dam contract. Plaintiffs initiated this litigation and have predicted future litigation pertaining to their rights under the 1956 contract. The court finds that this counterclaim involves an actual controversy and so declaratory judgement is appropriate under 28 U.S.C. § 2201.

3. Third Party Beneficiary Rights:

Plaintiffs allege they are third party beneficiaries to the 1956 contract because Link River Dam is operated for their benefit. They contend the parties to the 1956 contract were required to

obtain the irrigators' approval prior to any modifications to that contract.

For a party to sue as a third party beneficiary, the third party must show the contract was specifically intended to be for that party's direct benefit. *German Alliance Ins. v. Home Water Supply*, 226 U.S. 220, 230 (1912). *PacifiCorp* relies on *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 219 (7th Cir. 1996), which states:

> "Contracts often benefit persons besides the signatories, and breach harms them. To allow all these injured parties to sue would expose contract promisors to enormous potential liabilities . . . and would be inconsistent with the limitations that tort law imposes on remote liability."

The intention to specifically benefit a third party may be express or implied. Generally, beneficiaries of a government contract are assumed to be incidental beneficiaries and may not enforce the contract unless there is a "clear intent" to the contrary. *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 288 (D.D.C. 1993). The court may look beyond the contract to make such a determination. *Sepulveda v. Pacific Maritime Ass'n*, 878 F.2d 1137, 1139 (9th Cir. 1989). Such a showing entails an "onerous burden of proof" because of the long-standing rule that "[a]n individual who is not a party to a contract . . . does not have a right to sue for breach of that contract merely because he would benefit from its performance." *Maniere v. United States*, 31 Fed. Cl. 410, 417 (1994); *Berberich v. United States*, 5 Cl. Ct. 652, 655 (1984).

As evidence of their third party beneficiary status, plaintiffs note the introductory recital language of the 1956 contract, which states its renewal is in the best interests of users of the water in the Klamath River Basin. Declaration of Paul Simmons, Ex. I, p. 3. Plaintiffs also point to other factors they argue indicate an intent to directly benefit irrigators, such as the contractual prohibition on releasing water that may be needed

for irrigation, as well as statements in the reclamation statutes that such projects are primarily for the benefit of irrigation.

In particular, plaintiffs place heavy reliance on Article 6 of the 1956 contract, which prohibits PacifiCorp from using water when it may be "needed or required by the United States or any [entity] obtaining water from the United States for use for domestic, municipal, and irrigation purposes on Project Land." Plaintiffs argue this language clearly evinces an intent to directly and specifically benefit irrigators.

Defendants argue Article 6, read in full, is simply an exchange of assurances between Copco and Reclamation that nothing in the contract would alter the preexisting claims or water rights possessed by the parties to the contract. Defendants also note that this provision, by its terms, protects only persons taking water "from the United States." They assert this provision allows the United States to meet its obligations to such entities, but it does not expand the underlying rights held by those parties. While Article 6 makes it clear that Copco obtained a right to use water for power generation when such water was not needed by the United States or irrigators, nothing in Article 6 created or expanded any rights irrigators may have possessed to water in the basin. Those rights are created and governed by state water law and the irrigators' individual contracts with Reclamation. Therefore, defendants argue, Article 6 conferred no benefit to non-parties sufficient to create third party beneficiary rights.

PacifiCorp argues the contract here, particularly Article 6, created no new rights for the irrigators, but merely put irrigators on notice the government was not granting PacifiCorp any right to interfere with preexisting legal rights possessed by the irrigators. Therefore, PacifiCorp argues, any benefit to plaintiffs was incidental.

Defendants also argue plaintiffs' rights to water derive from their individual repayment contracts with Reclamation. The

1956 contract states the only benefits of the contract are to the parties themselves or their successors or assigns. Defendants assert plaintiffs are attempting to turn the 1956 contract into an entitlement to water in order to sidestep the limitations on water deliveries contained in their individual repayment contracts with Reclamation.

PacifiCorp cites *Norse v. Henry Holt and Co.*, 991 F.2d 563 (9th Cir. 1993). *Norse* involved copyrighted letters of Harold Norse, which he made available at the public library. Any person copying at the library had to sign an agreement making clear the library could not give legal authority to publish materials. An author copied Norse's letters and included them in a book published by Holt. Norse sued, arguing he was a third party beneficiary of the library's contract. The Ninth Circuit rejected this claim because the agreement simply put the user on notice that the library did not grant any right to publish materials, and thus the benefit to Norse was purely incidental. *Id.* at 568.

Reclamation must deliver water to project irrigators in accordance with the rights held by the United States in the project and the irrigators' individual repayment contracts, subject to the availability of water. Under those contracts, water shortages caused by "drought, canal breaks, inaccuracy in distribution, or *other causes* will not result in any liability 'against the United States . . . for any damages, direct or indirect, arising therefrom. . . .' " Declaration of Karl Wirkus [# 163] Ex. B, p. 12-13 (emphasis added). Reclamation argues a water shortage could result from a drought, from Reclamation's obligation to satisfy senior tribal rights, or Reclamation's obligation to comply with other federal laws, such as the Endangered Species Act. *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995) ("other causes" language in reclamation contract construed to covered Endangered Species Act listing). Defendants argue the repayment contracts

would preclude plaintiffs from suing the federal government if the above things were to occur.

These separate repayment contracts, while outside the issue of whether plaintiffs are third party beneficiaries to the 1956 contract, provide important context to the intentions of the parties to the 1956 contract. The court is allowed to look beyond the 1956 contract to make a determination regarding third party beneficiary status and finds these coexistent repayment contracts to be relevant evidence in making this determination. *Sepulveda v. Pacific Maritime Ass'n*, 878 F.2d 1137, 1139 (9th Cir. 1989).

Viewing the entire record before the court, in the light most favorable to plaintiffs, I find plaintiffs have failed to demonstrate the existence of a material fact indicating they are intended third party beneficiaries to the 1956 contract. The 1956 contract operates to plaintiffs' benefit by impounding irrigation water, and certainly was entered into with irrigators in mind. However, plaintiffs are not parties to the contract and there is no manifestation of intent by the parties to provide to the many irrigators participating in the project the right to sue under the contract or veto proposed modifications to it. The provision in the 1956 contract that establishes minimum and maximum lake levels appears to benefit irrigators, but the level is subject to fluctuation and is accompanied by significant discretion in the government and PacifiCorp to go outside the range. Moreover, while PacifiCorp and Reclamation benefit directly from the above provision, plaintiffs benefit only indirectly through Reclamation's enhanced ability to satisfy its underlying but separate obligations to deliver water to plaintiffs and others. Such an indirect benefit is incidental and, therefore, insufficient to confer third party beneficiary status on plaintiffs.

The 1956 contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law. The irrigators'

contracts with the government contain a clause holding the government harmless in the event of a shortage. Declaration of MacFarlane, Ex. M (a 1954 water user contract). To allow plaintiffs to sue for a shortage under the 1956 contract, to which they are not parties, in the face of the hold harmless provision contained in their individual repayment contracts, to which they are parties, would be inconsistent and is not supported by the record.

The language of the 1956 contract does not identify plaintiffs as intended beneficiaries of the contract. A review of the record as a whole, particularly the language of the contract itself, confirms this view. Article 15 limits intended beneficiaries to the parties to the contract. Under the arguments advanced by plaintiffs, most users of the Klamath Project water would stand as intended third party beneficiaries to the 1956 contract, a result not supported by the record. Moreover, the 1956 contract did not give plaintiffs water rights superior to those in plaintiffs' individual repayment contracts with Reclamation, although acceptance of plaintiffs' arguments would necessitate such a conclusion. Finally, plaintiffs' rights to water in the basin, whether as third party beneficiaries to the 1956 contract or under their individual repayment contracts with Reclamation, are subservient to senior tribal water rights and to subsequent legislative enactments by Congress, such as the Endangered Species Act. O'Neill, 50 F.3d at 680-81.

4. Conclusion:

The court finds the amended counterclaim constitutes an actual controversy and is therefore appropriate for declaratory judgment under 28 U.S.C. § 2201(a) due to the uncertainty surrounding current negotiations pertaining to the 1956 contract.

In paragraph 17 of its amended counterclaim, PacifiCorp seeks a declaratory judgement that: (1) plaintiffs are not third party beneficiaries to the 1956 contract with respect to

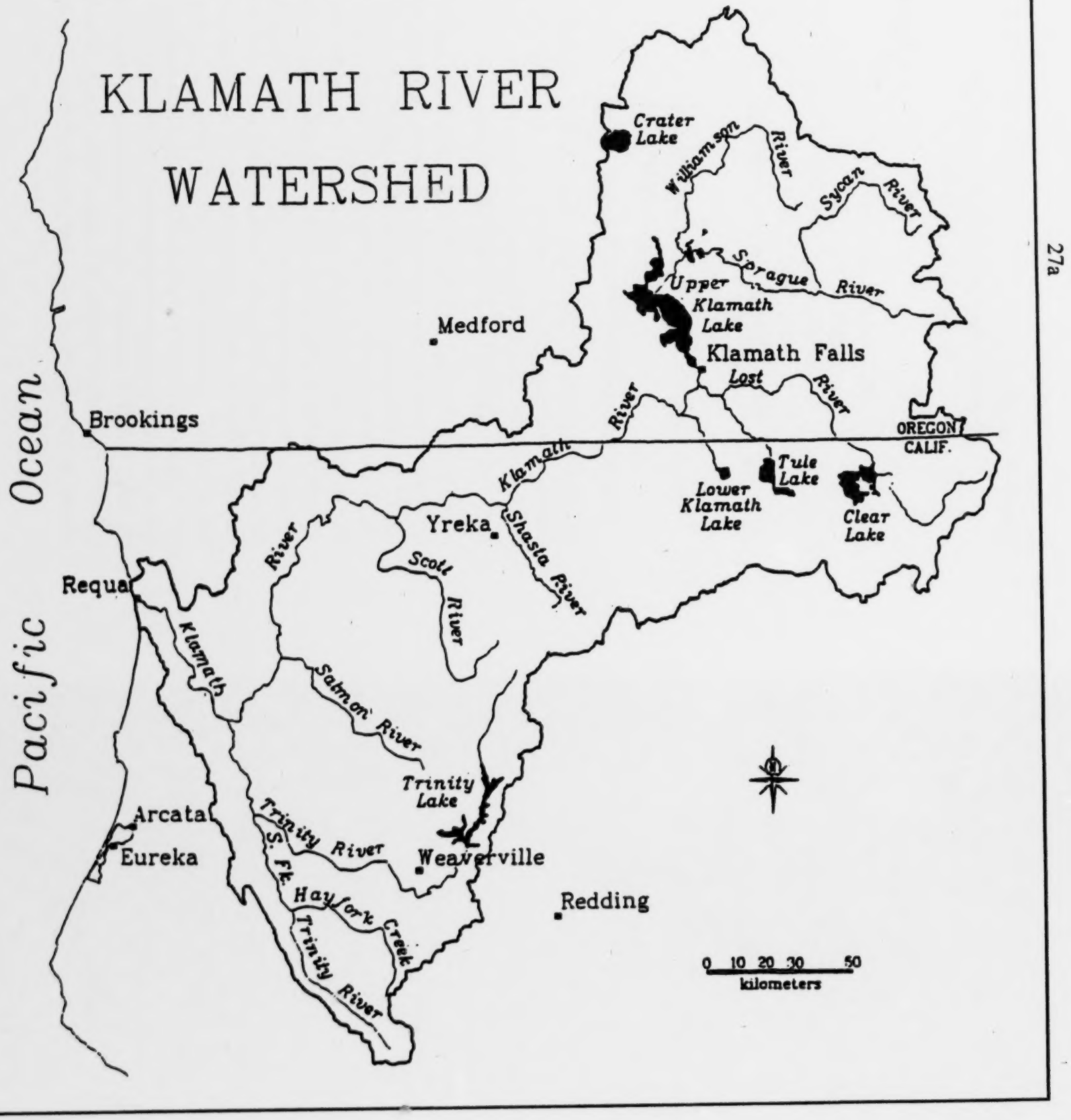
irrigation water, and the contract creates no rights in plaintiffs to irrigation water; (2) the 1956 contract may be amended with regard to PacifiCorp's rights and obligations to operate Link River Dam without plaintiffs' consent; and, (3) PacifiCorp is not liable to plaintiffs under the 1956 contract for implementing Federal defendants' water allocation decisions for the Klamath Project. [# 147], p. 4.

For the reasons set forth above, defendant PacifiCorp's motion for summary judgment on its amended counterclaim [# 164] is granted and its requested declarations are hereby adopted; defendant Reclamation's motion for summary judgment on defendant PacifiCorp's amended counterclaim [# 161] is granted; plaintiffs' motion to dismiss defendant PacifiCorp's amended counterclaim [# 151] is denied; and, plaintiffs' motion for summary judgment on defendant PacifiCorp's amended counterclaim [# 154] is denied.

Finally, defendant PacifiCorp's motion to strike [# 200] is denied. The record before the court does not support defendant's contention that these discussions amounted to "compromise negotiations" under Federal Rule of Evidence 408.

IT IS SO ORDERED.

KLAMATH RIVER WATERSHED



[Dated July 25, 1995]

UNITED STATES DEPARTMENT OF THE INTERIOR

[SEAL]

OFFICE OF THE SOLICITOR
Pacific Southwest Region
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Room E-2753
Sacramento, California 95825-1890

TO: Regional Director, Bureau of Reclamation, Mid-Pacific Region

FROM: Regional Solicitor, Pacific Southwest Region

SUBJECT: Certain Legal Rights and Obligations Related to the U.S. Bureau of Reclamation, Klamath Project for Use in Preparation of the Klamath Project Operations Plan (KPOP)

This memorandum describes the general rights to the waters in the Klamath and Lost River drainages affected by the operation of the U.S. Bureau of Reclamation's (Reclamation) Klamath Irrigation Project located within the Upper Klamath and Lost River Basins in Oregon and California. In addition, the obligations of Reclamation to the holders of these rights are discussed. The rights that are treated in this memorandum include those of the Klamath Project water users (those who hold contracts with the United States to receive water from the project), the Upper Klamath, Lower Klamath, Tule Lake, and Clear Lake National Wildlife Refuges (NWR) managed by the U.S. Fish and Wildlife Service (these refuges are located within the exterior boundaries of the Klamath Project), and the Klamath, Yurok, and Hoopa Tribes (they have treaty-based or federally reserved fishing and water rights that are or may be

affected by project operations). None of the above water rights has been quantified.[1]

Rights

Klamath Project Water Users

The Klamath Project water users obtain their supply of water for irrigation purposes from the project facilities pursuant to various contracts with Reclamation entered into pursuant to the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 371 *et seq.*, as amended and supplemented. The contracts are between Reclamation and a water district or Reclamation and an individual water user. These contracts provide, in general, that the water user is to receive enough water to satisfy the beneficial use for the irrigation of a specified acreage. Certain of the contracts specify the beneficial use amount on a per acre basis.

The underlying water rights for the project, upon which the water supply stated in each of the contracts discussed above depends, were obtained by Reclamation, in accordance with state law, in 1905, when Reclamation filed a notice of intent to appropriate all of the available water in the Klamath River and Lost River and their tributaries in Oregon. Similar filings were made for the waters originating in California, within the Lost River and Clear Lake drainages.[2] Subsequent to these filings,

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[1] The existence and nature of the Klamath Tribes' reserved water rights for hunting, fishing, and gathering were declared in *United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984).

[2] Oregon statutes concerning the appropriation of water before February 24, 1909, the effective date of the Oregon Water Rights Act of 1909, provided that the extent of the appropriation was determined by the actual capacity of the completed diversion structure, assuming that the requirement to post a notice of intent to appropriate together with application of water to beneficial use within a reasonable time had occurred. *See In re Waters of the Tualatin River and its Tributaries*, 366 P.2d 174 (Or. 1961). The laws for appropriation of water in California

Reclamation constructed project facilities through which water is delivered to the project water users. The project's 1905 water rights are junior to the reserved water rights of the tribes but senior to the reserved water rights of the refuges, as discussed below.

Federal law provides that Reclamation obtain water rights for its projects and administer its projects pursuant to state law relating to the control, appropriation, use or distribution of water used in irrigation, unless the state laws are inconsistent with express or clearly implied congressional directives. 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 678 (1978); *appeal on remand*, 694 F.2d 117 (1982). The beneficial ownership of a project water right is in the water users who put the water to beneficial use. *Nevada v. United States*, 463 U.S. 110 (1983). Under law of most western states a water right is obtained through appropriation followed by application within a reasonable time to beneficial use. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937). Oregon law (as well as California law) is similar to the laws of most other western states in that actual application of the water to the land is required to perfect a water right for agricultural use.[3]

Oregon also recognizes that water for irrigation purposes is appurtenant to the land for which it is appropriated and applied, but is not inseparable from the land. In re *Deschutes River and*

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that were in effect in 1905 were similar to those in Oregon. Cal. Civil Code of 1872, §§ 1410-22 (Deering 1977). The effective date of the California Water Commission Act, which established California's current appropriation scheme, is December 19, 1914.

[3] *See* ORS §§ 539.010 *et seq.*; *State ex rel. v. Hibbard*, 570 P.2d 1190, 1194 (Or. Ct. App. 1977); *Alexander v. Central Oregon Irrigation District*, 528 P.2d 582 (Or. Ct. App. 1974), and Cal. Water Code § 1240; *Joerger v. Pacific Gas & Elec. Co.*, 276 P. 1017 (Cal. 1929); *Madera Irr. Dist. v. All Persons*, 306 P.2d 886 (Cal. 1957).

Tributaries, 286 P. 563 (Or. 1930) ; see also *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 858 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983). Federal law concerning Reclamation projects also provides that the use of water acquired under the Act "shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and the limit of the right." 43 U.S.C. § 372. Beneficial use is determined in accordance with state law to the extent not inconsistent with congressional directives. *See Alpine Land & Reservoir Co.*, 697 F.2d at 853-854; see also *California v. United States*, 438 U.S. at 678.

Wildlife Refuges

There are two National Wildlife Refuges that are particularly dependent on project operations: Lower Klamath and Tule Lake NWRs.[4] The Lower Klamath NWR consists of 51,713 acres which straddle the Oregon-California border. This NWR was created by Executive Order No. 924 (Aug. 8, 1908) "as a preserve and breeding ground for native birds." The boundaries of the Lower Klamath NWR were altered by Executive Order No. 2200 (May 14, 1915). The Tule Lake NWR is a 39,990 acre marsh area located in northern California just south of the Oregon border. Tule Lake was created by Executive Order No. 4975 (Oct. 4, 1928) also "as a refuge and breeding ground for birds."[5]

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[4] There are two other National Wildlife Refuges within the exterior boundaries of the project that are also dependent on project operations. The Upper Klamath NWR was created in 1928 and is located at the northern portion of Upper Klamath Lake. It encompasses 14,965 acres of marsh and open water. The Clear Lake NWR was created in 1911 and encompasses 20,000 acres of water surface and upland area within the Clear Lake drainage in the Lost River Basin.

[5] The interrelation of the Klamath Project irrigation uses and the NWR purposes are further delineated in the Kuchel Act, 16 U.S.C. §§ 695k-695r.

Each refuge has a federal reserved water right to the amount of water, unappropriated at the time of creation of the refuge, necessary to fulfill the primary purposes of the refuge. *See United States v. New Mexico*, 438 U.S. 696 (1978). The priority date for the reserved water right of each refuge is the date of the executive order creating that refuge. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976). In addition, certain lands within the Lower Klamath and Tule Lake refuges that are irrigated have a priority date of 1905 based on the Klamath Project water rights. Finally, the refuges receive significant quantities of return flows and other project waters which, although initially used for irrigation purposes, are beneficially reused for refuge purposes.

Klamath-Indian Tribes

The Klamath Indian Tribes have treaty-based rights. The exercise of certain of these rights are affected by project operations. The Tribes' primary interest is in the operation of Upper Klamath Lake because it serves as habitat for fish protected by their treaty rights, including two endangered species of fish, the Lost River and shortnose suckers. These fish are a traditional food source for the Tribes. Changing water elevation in the lake and recurring water quality problems impact the suckers.

A treaty entered into in 1864 reserves to the Klamath Tribes fishing, hunting, and gathering rights on lands that were formerly part of the original Klamath Indian Reservation in Oregon.[6] The reservation abutted Upper Klamath Lake and

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[6] In 1954, the Klamath Indian Reservation in Oregon was terminated pursuant to the Klamath Termination Act. Act of Aug. 13, 1954, c. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C. §§ 564-564x). Under this Act, reservation lands were disposed to private parties, individual Indians, the Forest Service and the Fish and Wildlife Service, but the Tribes' hunting, fishing, and gathering rights, and supporting water rights, were left intact. *United States v. Adair*, 723 F.2d 1394, 1412 (9th Cir.), *cert. denied*, 467

included several of its tributaries, notably the Williamson River. Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, 16 Stat. 107. The treaty reserves to the Tribes a federal Indian reserved water right to support their hunting, fishing, and gathering rights.[7] *United States v. Adair*, 723 F.2d 1394 (9th Cir.), *cert. denied*, 444 U.S. 1252 (1984). The Tribes' water right includes "the right to prevent other appropriators from depleting the streams['] waters below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411; *accord Joint-Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985).

The Tribes' water right includes the right to certain conditions of water quality and flow to support all life stages of fish. *See United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984); *see also United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 7 (D. Ariz. 1992), *aff'd in part & vacated in part*, 31 F.3d 1428 (9th Cir. 1994), *on remand Globe Equity No. 59*, Phase IV, slip op. (April 14, 1995). The Tribes, water right attaches to bodies of water

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U.S. 1252 (1984); *Kimball v. Callahan*, 590 F.2d 768, 775 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979); *Kimball v. Callahan*, 493 F.2d 564, 568-69 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974). The Klamath Tribes were later restored as a federally recognized tribe under the Klamath Restoration Act of 1986. Pub. L. No. 99-398, 100 Stat. 849.

[7] The Tribes' water right is not dependent on state law, but rather is controlled by federal law. However, in an adjudication of water rights pursuant to the McCarran Amendment, 43 U.S.C. § 666, this federal right would be subject to quantification by a state court. *Adair*, 723 F.2d at 1411 n.19.

located within the original boundaries of the Klamath Indian Reservation. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support a tribal fishery within the original reservation.[8] *Cf. Arizona v. California*, 373 U.S. 546, 595 n.97, 600, *decree entered*, 376 U.S. 340, 344 (1964) (awarding reserved water right in off-reservation river). The standard to be applied in determining the quantity of water secured by this right has not been determined as of the date of this memorandum. The Tribes' water right is aboriginal in origin and thus has a priority date of time immemorial. *Adair*, 723 F.2d at 1415.

Yurok and Hoopa Valley Indian Tribes

The Yurok and Hoopa Valley Tribes have federal Indian reserved fishing rights to take anadromous fish within their reservations in California. Memorandum from the Solicitor to the Secretary, Fishing Rights of the Yurok and Hoopa Valley Tribes, M-36979 (Oct. 4, 1993) (Sol. Op.). These rights were secured to the Yurok and Hoopa Indians by a series of nineteenth century executive orders and confirmed to the Yurok and Hoopa Tribes by the 1988 Hoopa-Yurok Settlement Act (HYSA) , 25 U.S.C. § 1300i *et seq.*[9]

In 1855, the President, by Executive Proclamation, established the Klamath Reservation in California.[10] I C. Kappler, *Indian*

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[8] In the pending Snake River Basin Adjudication in Idaho, the United States has made claims for off-reservation instream flow water rights derived from Indian fishing rights to anadromous fish. The quantity of flow claimed is that amount required to provide adequate flows to maintain fisheries habitat in the stream reach on a monthly basis.

[9] For the purpose of determining the existence of reserved water rights, there is no consequence to the fact that the Tribes' rights are derived from executive orders rather than treaties. *Arizona v. California*, 373 U.S. at 598.

[10] The executive order establishing the Klamath Indian Reservation was issued pursuant to the Act of March 3, 1853, 10 Stat. 238, authorizing the

Affairs: Laws and Treaties 816-817 (1904). The Hoopa Valley Reservation was formally set aside for Indian purposes by executive order in 1876, and the reservation was extended by another executive order in 1891 to encompass the Klamath Reservation and the connecting strip of land in between.[11] *Id.* at 815; *see People v. McCovey*, 685 P.2d 687, 689 (Cal. 1984); *see also Donnelly v. United States*, 228 U.S. 243, 253-259 (1912); *Blake v. Arnett*, 663 F. 2d 906, 911 (9th Cir. 1981); *Esler v. Gill Net Number One*, 54 Cal. Rptr. 568, 571-72 (1966). The HYSA partitioned the extended reservation into the present Hoopa Valley and Yurok Reservations and declared the assets of each reservation held in trust by the United States for the benefit of the respective Tribes. 25 U.S.C. § 1300i-l(b).

The Yurok and Hoopa Valley Tribes' fishing rights entitle them to take fish for ceremonial, subsistence, and commercial purposes. *United States v. Eberhardt*, 789 F.2d 1353, 1359 (9th Cir. 1986). Their fishing rights "include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living." Sol. Op. at 3.

The executive orders setting aside what are now the Yurok and Hoopa Valley Reservations also reserved rights to an instream flow of water sufficient to protect the Tribes' rights to take fish within their reservations. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Anderson*, 591 F. Supp. at 5-6. As with the Klamath Tribes, the Yurok and Hoopa Tribes' water rights include the right to prevent other appropriators from depleting the streams' waters below a protected level. *See Joint Board of Control*, 832 F.2d at 1131-32; *Adair*, 723 F.2d at 1411; *see also Kittitas*

President "to make . . . reservations in the State of California for Indian purposes."

[11] These executive orders were issued pursuant to the Act of April 8, 1864, 13 Stat. 39.

Reclamation District, 763 F.2d at 1033. The Tribes' rights include the right to certain conditions of water quality and flow to support all life stages of fish. *See Anderson*, 591 F. Supp. at 5-6; *see also Gila Valley Irrigation District*, 804 F. Supp. at 7. The Tribes' fishing right also supports a water right in off-reservation areas to the extent necessary to support the Tribes' on-reservation fisheries. *Cf. Arizona v. California*, 373 U.S. at 595 n.97, 600 (awarding reserved water right in off-reservation river). The exact standard to determine the amount of water secured by these rights has not been determined as of the date of this memorandum. The priority date of the Yurok and Hoopa water rights are at least as early as 1891, and may be earlier.

Obligations

Klamath Project Water Users

Reclamation has an obligation to deliver water to the project water users in accordance with the project water rights and the contracts between Reclamation and the water user (which may be through a water district) subject to the availability of water. Reclamation must protect the rights of the users of project water, *see* Filing of Claims for Water Rights in General Stream Adjudications, M-36966, 97 I.D. 21 (July 6, 1989), and cannot "ignore . . . the obligations that necessarily devolve upon it from having mere title to water rights for the [project], when the beneficial ownership of these water rights resides elsewhere." *Nevada v. United States*, 463 U.S. at 127. Water would not be available, for example, due to drought, a need to forego diversions to satisfy prior existing rights, or compliance with other federal laws such as the Endangered Species Act. Water lawfully stored in the project's reservoirs can be used for domestic and irrigation purposes to the extent the water is applied to beneficial use within the project. Reclamation cannot store or divert water for project purposes that is needed to satisfy prior existing rights.

Refuges

Reclamation has an obligation to ensure that the refuges receive adequate water to fulfill their federal reserved water rights (*i.e.*, the amount of water necessary to fulfill the primary purposes of the refuges) when in priority and when water is available. In addition, Reclamation can continue to provide available project water for beneficial reuse by the refuges to the extent of past and current usage and consistent with project purposes.

The Kuchel Act (see footnote 5) requires that the refuge lands be used primarily for waterfowl purposes but with full consideration given to optimum agricultural use so far as agricultural use is consistent with the refuge purposes. 16 U.S.C. § 6951. In addition, the pattern of agricultural leasing existing in 1964 is to be continued on specified lands within the refuges as consistent with proper waterfowl management. *Id.* § 695n. Thus, it is possible that certain irrigated lands within the refuge boundaries would not be cultivated in the usual manner if that would be inconsistent with the purposes of the refuges. If such change in cultivation resulted in less water being used for irrigation within the project, then more water may be available for the refuges, pursuant to a change in the water right or otherwise, subject to prior existing rights and water availability.

The Tribes

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is one held by all federal agencies. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). In general, the trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. *See Mitchell v. United States*, 463 U.S. 206, 224-226 (1982); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-426 (1991); *Joint Board of Control of the*

Flathead, Mission and Jocko Irr. Dist. v. United States, 862 F.2d 195 (1988).

Reclamation is obligated to ensure that project operations not interfere with the Tribes' senior water rights. This is dictated by the doctrine of prior appropriation as well as Reclamation's trust responsibility to protect tribal trust resources.

With respect to the Tribes, fishing rights, Reclamation must, pursuant to its trust responsibility and consistent with its other legal obligations, prevent activities under its control that would adversely affect those rights, even though those activities take place off-reservation. *See Parravano v. Babbitt*, 861 F. Supp.914, 924 (N.D. Cal. 1994), *appeal pending*. Thus, Reclamation must use any operational discretion it may have to ensure that those rights are not diminished. In doing so, Reclamation, in formulating any operating plan, must minimize unnecessary waste and take such other steps within its legal and contractual authority as are necessary to protect tribal rights. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 255-256 (1973). In relation to a different Reclamation project, a court directed Reclamation, in formulating an operating plan, to provide, among other things, an effective means to measure water use, to end delivery of water to unentitled lands, and to assure compliance with such measures by project water users. *Id.* at 258.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, requires Reclamation to review its programs and utilize them in furtherance of the purposes of the ESA. 16 U.S.C. § 1536(a)(1). Reclamation has an obligation not to engage in any action that is likely to jeopardize the continued existence of a listed species. In addition, Reclamation must consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (with respect to anadromous species) to insure that any action is not likely to jeopardize the

continued existence of a listed species or result in the destruction or adverse modification of critical habitat of such species.[12] *Id.* § 536(a)(2). If as a result of such consultation, FWS or NMFS, as appropriate, finds that the action will result in the incidental taking of a listed species but is not likely to jeopardize the continued existence of the species, or that there is a reasonable and prudent alternative to the proposed action that will avoid such jeopardy, then FWS or NMFS will set forth the impact of such incidental taking, the reasonable and prudent measures necessary to minimize such impact, and the terms and conditions that Reclamation must comply with to implement such measures. *Id.* § 1536(b)(4).

Two species of sucker fish that occupy Upper Klamath Lake and its tributaries (as well as other water bodies within and adjacent to the project) have been listed as endangered under the ESA and Reclamation has consulted with the FWS with respect to the effects of project operations on these species. The FWS issued a Biological opinion in 1992 (Long Term Biological Opinion) that set certain mandatory lake level elevations for Upper Klamath Lake necessary to avoid jeopardizing the species.

The coastal steelhead has been proposed for listing by NMFS. 60 Fed. Reg. 14253 (March 16, 1995). Reclamation has, through the conferencing provisions of the ESA, *Id.* § 1536(a)(4), determined that the 1995 operations of the Klamath Project will not jeopardize the continued existence of the steelhead. NMFS has concurred in this determination.[13]

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[12] Critical habitat has not been designated for the Lost River and shortnose suckers.

[13] A petition to list the chinook salmon has been received by NMFS. 60 Fed. Reg. 30263 (June 8, 1995). NMFS has proposed to list the coho salmon. ___ Fed. Reg. (__ July _, 1995).

Conclusion

None of the rights discussed above are quantified (except see footnote 1). Even so, Reclamation is not free to disregard these rights, and its discretion to determine the necessary means to protect and fulfill each of these rights is limited. Reclamation must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights. Reclamation must also, consistent with its statutory, contractual and trust obligations, fulfill the rights of the project water users and the refuges.

/s/ David Nawi

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[SEAL]

DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

March 18, 1996

Martha Pagel, Director
Water Resources Department
158 12th Street NE
Salem, OR 97310

Re: Klamath Adjudication
DOJ File No. 690-002-G0037-86-0010

Dear Ms. Pagel:

You have asked for a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and an analysis of water management authority in the basin pending the completion of the adjudication. The questions follow the Ninth Circuit Court of Appeals decision in *US v. Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert denied sub nom Tribe v. State of Oregon*, __ US ___, 116 SCt 378, 133 LEd 2d 302 (October 30, 1995). The case affirmed Oregon's authority, under the McCarran Amendment, to adjudicate

federal and tribal water rights claims, and cleared the path for the adjudication to begin.[1]

The adjudication will resolve three general categories of claims in the Basin: the claims of private users holding individual water rights; the claims of Klamath Project Irrigation districts holding rights developed under the authority of the federal Reclamation Act and Oregon law; and the claims of federal agencies and tribes, holding federal reserved water rights. The Department has already received claims from private users in the Basin. The claiming period for this category of claims closed February 1, 1991. The Department may now open the claiming period for Klamath Project and federal reserved claims. All claims must be filed before the "open inspection period" (pursuant to ORS 539.090) since all claims must be available for inspection by all other parties to the proceeding at one time. After the open inspection period, the opportunity for contests, and the preparation of the Director's determination, the matter will be referred to the Klamath County Circuit Court for entry of the final decree.

Regardless of the legal *basis* of the claims, the state will adjudicate all claims under Oregon's adjudication law (ORS chapter 539). The adjudication will establish the relative priority dates as well as the nature and scope (*e.g.*, allowed rate, duty, use, place of use and point of diversion) of all claims. Once adjudicated, the state will then regulate water use as between the rights. *Pacific Live Stock Company v. Lewis*, 241 US 440, 36 SCt 637, 60 LEd 2d 1084 (1916). The state has authority under the McCarran Amendment (43 USC § 666)

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[1] The Ninth Circuit case did not resolve the claims of the Klamath Allottees Association, which asserted that individual tribal allottees were not required to pay filing fees. We believe the adjudication could continue even while those claims are being resolved, since the allottees' challenge to the state's underlying jurisdiction was conclusively resolved by the court's opinion.

and *US v. Oregon* to adjudicate these claims regardless of their legal basis (*i.e.*, state or federal law) and to issue water right certificates as evidence of those rights.

I. CLASSES OF CLAIMS

A. Private Water Rights

The unadjudicated rights of private appropriators are derived from state law, primarily the common law of prior appropriation based on the use of water initiated prior to February 24, 1909.[2] (Technically, Klamath Project water rights might be viewed as private water rights, held by non-federal entities, but these claims are discussed separately, below.) In addition, private individuals occupying property that was formerly Klamath Indian Reservation or federal forest land may be entitled to claim "Walton" rights for those lands. They have acquired a quasi-federal reserved right with the acquisition of the land to which the federal reserved right was appurtenant. *See Colville Confederated Tribes v. Walton*, 647 F2d 42, 50-51 (9th Cir 1981).

B. Klamath Project Water Rights

Water rights associated with the irrigation of the Klamath Project are based upon the federal Reclamation Act of 1902 (32 Stat 388) and a 1905 Oregon statute (1905 Or Laws ch 228) intended to assist the federal government in developing irrigation projects. The 1905 Oregon statute authorized the federal government to tie up unappropriated water of a river system for future irrigation projects by filing a Notice with the

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[2] Post-1909 water rights are acquired after an application for a water right has been evaluated under public interest standards, a permit granted, the use developed ("perfected"), and a certificate issued. Persons holding these rights have the right to be parties to the adjudication, and are allowed to contest the claims of others whose rights are being adjudicated. However, these post-1909 water right holders need not participate in the adjudication to re-establish or protect their rights.

state identifying its intention to develop a particular project. The United States' Notice with respect to the Klamath Project specified that:

> The United States intends to use the above described waters [of the Klamath River Basin] in the operation of works for the utilization of water in the State of Oregon under the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388) known as the Reclamation Act. (Notice signed by T. H. Humpherys, Engineer of the U.S. Reclamation Service, dated May 17, 1905.)

The water was "deemed appropriated" under Oregon law when the United States made its filing. *In Re Waters of the Umatilla River* 88 Or 376, 385 (1918). The Reclamation Act, authorized the Secretary of the Interior to "locate and construct. . . irrigation works for the storage, diversion, and development of waters". 32 Stat. 388 § 2. The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation. A memo prepared by David Nawi, regional solicitor for the Department of Interior dated July 25, 1995 (Nawi memo), recognizes that whatever claims the Bureau will assert in the adjudication will be based on this authority.

Apparently, a dispute has emerged about who will actually own these rights. The Bureau may claim ownership of the water right under the Reclamation Act and its 1905 Notice. However, the United States Supreme Court has consistently held that water rights developed under a federal Reclamation Act project, (such as the Klamath Project) do not belong to the Bureau. "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract . . . the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works." *Nevada v. United States*, 463 US 110, 125,

103 SCt 2906, 2916, 77 LEd 2d 509 (1983) (quoting *Nebraska v. Wyoming*, 325 US 589, 65 SCt 1332, 89 LEd 2d 1815 (1945)). *See also Ickes v. Fox*, 300 US 82, 57 SCt 412, 81 LEd 2d 412 (1937). The Bureau might hold the storage rights associated with the Klamath Project, since the Bureau may own the land covered by the reservoirs. However, a final determination of the ownership question will require further factual determination.

More likely, these water rights are held by the irrigation districts or perhaps by individual district members. Whether the right is owned by the district or its members is based upon the contractual arrangement between the districts and its members. See *In Re Waters of Willow Creek*, 119 Or 155 (1925).

C. Federal Reserved Water Rights

The class of claims which gave rise to the *US v. Oregon* law suit is that associated with federal agencies under *Winters v. United States*, 207 US 564, 28 SCt 207, 52 LEd 2d 340 (1908). *Winters* announced what has become known as the reserved rights doctrine. Under the reserved rights doctrine, when land is set aside from the public domain, enough of the then existing unappropriated water is reserved to satisfy the primary purpose(s) of the reservation. *United States v. New Mexico*, 438 US 696, 98 SCt 3013, 57 LEd 2d 1052 (1978); *Cappaert v. United States*, 426 US 128, 96 SCt 2062, 48 LEd 2d 523 (1976). The doctrine creates water rights impliedly, rather than expressly, and is an exception to Congress' explicit deference to state water laws in other areas. *United States v. New Mexico*, 438 US at 715. *See also San Carlos Apache Tribe v. Arizona*, 668 F2d 1093 (9th Cir 1982) and *Colville Federated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981).

For the Klamath Tribes, the reserved right purposes have been identified in *US v. Adair*, 723 F2d 1394, 1409 (9th Cir. 1983): "[T]he right to hunt, fish and gather*** [and]

convert[ing] the Indians to an agricultural way of life * * * qualify as primary purposes of the 1864 treaty." The reserved rights of other federal reservations, (national forests and wildlife refuges and the Crater Lake National Park, for example) will similarly be established for, and at the level necessary to accomplish their primary purpose(s), but "no more". *Cappaert* at 141.

The purpose of the foregoing discussion is not to pre-judge any of the claims. All claimants will be expected to establish the legal and factual basis for their claims. This description is intended to merely give a glimpse of the nature and complexity of the claims likely to be asserted by the various claimants. Once the rights have been adjudicated, the state will regulate between users based on priority date, regardless of how the right was created.

II. WATER MANAGEMENT PENDING COMPLETION OF THE ADJUDICATION

While the law is relatively clear with respect to water management after the adjudication is completed, recent assertions by the federal government have raised questions about how water must be used while the adjudication is in progress. Historically, the Bureau has managed the Klamath Project by diverting live flow from the Klamath River and water stored from the Upper Klamath Lake for irrigation in the Project, consistent with the Notice the United States filed at 1905. The Bureau has operated the storage projects consistent with irrigation use. Now the Bureau is asserting an obligation to change its management of the storage projects to benefit downstream fishery and trial interests, rather than irrigation uses.

A. State Regulation

While the state has the authority under the McCarran Amendment to both adjudicate and then administer, *i.e.*, regulate between, water rights, it is less clear how water must

be managed pending completion of the adjudication. Oregon has taken the position that it regulates neither in favor of nor against unadjudicated water rights. *Accord Rettkowski v. Department of Ecology*, 858 P.2d 232 (Wash. 1993); *South Delta Water Agency v. U.S., Dept. of Int.* 767 F2d 531 (1985) (quantification of federal water rights must occur before authority to administer those rights conferred under McCarran Amendment.)[3]

B. Federal Regulation

Because the state will not regulate unadjudicated rights, the federal government conceivably could. The basis of the proposed Klamath Project Operations Plan (KPOP), discussed below, is that the federal government asserts it has the authority to regulate water uses in the Basin, at least among the federal claimants, pending completion of the adjudication. I conclude that there is no such federal authority for three reasons, set forth below.

1. There is no federal regulatory authority or system. The Nawi memo does not identify any authority which authorizes the Bureau, or any federal agency, to regulate water uses under the prior appropriation doctrine. While the western states have developed elaborate systems to ensure the legal distribution of water among competing claimants, there is no parallel federal system. The purpose of the McCarran Amendment was to require federal and tribal participation in the states' water rights systems rather than to create a duplicative federal system.

2. The rights have not been determined. Until the completion of the Klamath Basin Adjudication, none of the federal, Klamath Project or private claims have been quantified.

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[3] Of course, we presume that all users exercise their rights within their legal limits, even though the state will not shut off unadjudicated rights (nor shut off any other user to satisfy the claim of an unadjudicated right).

In *South Delta Water Agency*, the United States asserted and successfully established the rule of law that no regulation of federal rights may occur until those rights have been adjudicated pursuant to the McCarran Amendment. The rule is based on the legal truism that regulation in favor of a water right necessarily requires a determination of what that right is. Any attempt to regulate unquantified rights creates both practical and legal problems. For example, since the California Tribes' claims are unquantified, there is no way to calculate the amount of water to which the tribes would be entitled. The Nawi memo concedes that there is not yet even a standard by which the tribal reserved rights can be quantified.[4]

Distribution of water to the wildlife refuges is also problematic. First, I understand that some land acquired for use as the wildlife refuges was acquired from the states of Oregon and California. As a technical matter, only land "set aside from the public domain" may acquire a reserved right, not formerly state or privately owned land. Second, if the United States does not agree with the 1950 Oregon AG opinion cited in footnote 6, at the time the refuges were created, all water in the basin was "redeemed appropriated" by the Klamath Project, and no unappropriated water could be reserved for the refuges or any other use.

Third, the Nawi memo assumes that the refuges are entitled to return flows from project water, or perhaps that the refuges can use water diverted for project use interchangeably for

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[4] Even if the adjudication had been completed, under *Adair*, a tribal reserved instream flow claim is only for the amount of water to support the tribal fishery as "currently exercised," 723 F2d at 1414, not as it may have been at the time the reservation was created. Thus, I do not believe that the tribal claim could be used as the basis to "restore" a fishery to what it may have been in the early part of the century. The fishing rights of the California tribes as currently exercised necessarily cannot require a change in the way the Klamath Project and other unadjudicated rights have historically been used.

refuge or irrigation uses. Under the Oregon law governing the irrigation rights, the return flows of water diverted for irrigation purposes, but still within the district's boundaries, are still under the control and subject to appropriation by the districts for the underlying (that is, irrigation) purposes. *Jones v. Warmsprings Irrigation District*, 162 Or 186, 91 P.2d 542 (1939); *Cleaver v. Judd*, 238 Or 266, 393 P.2d 193 (1964).

While return flows may be subject to appropriation by others, for example the refuges, those claims will always be inferior to the claims of the original appropriator. An appropriator who has acquired a right to return flows is at the mercy of the original appropriator, who may decide (or be ordered by the state) not to divert water at a rate that creates return flows. (The presence of return flows may be an indication that more water is being diverted than is necessary to satisfy the underlying beneficial use, and may therefore constitute "waste.")

3. Not all rights are subject to federal regulation. To be fair and effective, any system of regulation between rights in a prior appropriation system must necessarily include all holders of water rights. The prior appropriation system of water law requires that in times of shortage, the senior-most user (the user with the oldest, or most senior, priority date) may place a "call" on the water source. Then, the junior-most users, in reverse order of priority date, must cease to use any water until all senior users are completely satisfied. To work, every user must be subject to the system. The Bureau identifies no way that it can shut off junior users who are not under direct federal control, to satisfy the calls of senior appropriators. Only the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system.

There are a number of rights junior to the Klamath Project rights, both in California and Oregon. For example, I understand that the Central Valley Project (CVP) in California diverts from the Trinity River (a tributary to the lower Klamath

River) an amount of water equal to the flow of the upper Klamath River. The CVP was authorized under the provisions of the Emergency Relief Appropriation Act of 1935, ch. 48, § 4, 49 Stat. 115, and reauthorized pursuant to the Rivers and Harbors Act of August 26, 1937, ch. 832, 50 Stat. 844, 850. Consequently, the CVP priority date is significantly junior to Klamath Project water rights. Presumably, there are other non-federal users in California and Oregon whose priority dates are junior to (and thus would be required to provide water to senior users before) the Klamath Project. California and Oregon will regulate users of the Klamath River based on priority date, not on the location of the state line, once the rights are established by court decree. ORS 540.045(3).

C. Bureau Reallocation of Klamath Project Water

A related and troubling issue has arisen because the Bureau is taking the position that "it must exercise its statutory and contractual authority to the fullest extent to protect the tribal fisheries and tribal water rights." Nawi Memo at 10. Implementing this advice, a draft of the Klamath Project Operations Plan (KPOP) purports to authorize the Bureau (at least pending completion of the adjudication) to reallocate water from irrigation uses to other unquantified and unadjudicated uses for the projection of fish and satisfaction of California tribal claims.

I do not dispute that the California tribes may have reserved water rights for fisheries and other purposes. However, the Nawi memo does not identify either how the amount of water the tribes are entitled to could be determine, or why a tribal "call" on the river could only be satisfied from Klamath Project water rather than by standard application of the prior appropriation system by regulatory the junior-most users first.

The KPOP aims to protect the downstream anadromous fish which have been proposed for listing under the federal Endangered Species Act (ESA). Until a listing is made, action

under the ESA seems premature. Also, while the Nawi memo argues the Bureau is required to exercise its statutory authority to preserve endangered fish, it does not identify the source of that authority. The ESA does not confer additional authority on the Bureau to protect the fish; rather, it requires the Bureau (and every federal agency) to exercise the authority it already possesses in a certain way. I am unaware of any independent grant of statutory authority to the Bureau which would allow the transfer of water from the Klamath Project to protect endangered fish. The Bureau exercised its statutory authority when it filed for all unappropriated water necessary to develop the Klamath Project pursuant to state statute and the 1902 Reclamation Act. It has identified no independent authority to reallocate water legally obligated to that original purpose.

The United States Supreme Court specifically rejected a United States' contention that it had the authority to unilaterally reallocate state-law based water rights acquired under the Reclamation Act to endangered fish protection or tribal treaty purposes. In *Nevada v. United States*, 463 US 110, 103 SCt 2906, 77 LEd 2d 509 (1983) the United States sought to reallocate water from irrigators within a federal project for the benefit of endangered fish and a tribal fishery. The Court rejected United States' position:

> We conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the Orr ditch decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushes of wheat, to be bartered, sold, or shifted about as the Government might see fit.

Nevada v. United States, 463 US at 1126, 103 SCt at 2916.

The Klamath Project water fights have not been adjudicated, but I see nothing in the rationale of *Nevada* which would justify a view that the United States could reallocate water rights acquired under the Reclamation Act pending completion of a

state adjudication. Rather, the court rejected inherent United States' authority to ignore the limitations of the water rights it held, stressing the disruption that would otherwise result.[5]

> We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West.

Id., 463 US at 121, 103 SCt at 2914.

Thus, while I recognize the United States' obligations to both Indian Tribes and endangered species, I do not see how a general governmental obligation can be converted to specific Bureau authority to reallocate water stored under a right acquired for irrigation in the Klamath project to either of these other uses, absent specific federal authorization for the new use and compliance with state law.

Several cases analyzing Bureau efforts to satisfy endangered fishery protection and tribal trust responsibilities from Bureau projects illustrate this analysis. In *Carson-Truckee Water Conservancy District v. Clark*, 741 F2d 257 (1983), the Ninth Circuit held that the bureau could operate the Stampede Reservoir (located in California) for the purpose of maintaining endangered fish in the Pyramid Lake (located in Nevada) and to satisfy its trust obligations to the Pyramid Lake tribe. However, those uses were allowed because the reservoir had been specifically authorized for the purpose of protecting fish

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[5] The Bureau may be able to reach the same result by "transferring" the water right from irrigation use to fishery purposes. The state allowed the use of water stored for irrigation purposes in McKay reservoir (under the authority of the Reclamation Act and the 1905 Oregon law) to be transferred to fishery and tribal purposes upon compliance with state transfer law. The Bureau in that case had separate authority under the federal Umatilla Basin Project Act to allow the use of the Umatilla Project for non-irrigation uses. A transfer can occur only after the right is decreed, however, ORS 540.505(4).

and wildlife and the Bureau water was legally stored in the reservoir under a permit from the state of California for those purposes. No state water rights (from either state) had been acquired to use the water for irrigation, municipal or industrial purposes, although the authorizing act would have allow water rights for those purposes. The Court held the Bureau could not be forced to provide water to uses (municipal and industrial) for which neither it nor the districts held a right.

Here, however, the Klamath Project has acquired vested rights under state law for all unappropriated water as of 1905 necessary to satisfy the Klamath Project beneficial uses.[6] While that right will be quantified in the adjudication, the Nawi memo recognizes that the Klamath Project's claim for both the storage of water in the Klamath Lake and for diversion of live flow into the Klamath Project system is pursuant to irrigation rights developed under the Reclamation Act and state law.

O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995) further illustrates this point. In *O'Neill* the court noted that Congress amended the Central Valley Project Act by means of the Central Valley Project Improvement Act (CVPIA), Publ. L. No. 102-575, 106 Stat. 4706 *et seq.*, to require the Bureau to satisfy fishery needs. The CVPIA created the specific statutory

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[6] Technically, the United States acquired absolutely all unappropriated water of the Basin by its filing in 1905, so long as it was developed for irrigation purpose pursuant to the Reclamation Act and the 1905 Oregon statute. That reservation has not ever been technically relinquished, but I assume that the United States does not intend to disagree with the 1950 Oregon Attorney General Opinion, 25 Op Atty Gen 62, that determined that water which was not developed by at least 1950 was available for appropriation by others. Should the United States take the position that it still had all water unappropriated as of 1905 tied up under its 1905 filing for purposes of continuing the development of irrigation in the Klamath project, there would be no water available to reserve for purposes of the wildlife refuges, developed after 1905, nor for any other post-1905 federal reserved or other water right.

authority necessary to allow the Bureau to provide water for endangered fish. By contrast, in the Klamath Project situation, the Nawi memo does not identify, nor am I aware of, any corresponding federal law to authorize these new uses of water stored in the Klamath Lake to which the Klamath Project irrigation districts are entitled.

The KPOP must be based on legal authority (even if unadjudicated at present) which the bureau presently has. I am unaware, and the Nawi memo does not identify, what authority that might be.

CONCLUSION

Water rights for the Klamath Project were acquired for irrigation purposes. No state or federal authority has reallocated this irrigation right to other uses. The specific nature and scope of Klamath Project, federal reserved and private water rights will be determined in the Klamath Basin Adjudication.

Additional Questions to Be Answered in Separate Advice

In meeting with officials from the State of California, we have also identified a number of other issues relating to overlapping or ambiguous jurisdiction between the two states. Those questions will be the subject of separate advice.

Sincerely,

/s/ STEVE SANDERS

STEPHEN E.A. SANDERS
Assistant Attorney General
Natural Resources Section

[Dated Jan. 9, 1997]

UNITED STATES DEPARTMENT OF THE INTERIOR

[SEAL]

OFFICE OF THE SOLICITOR
Pacific Southwest Region
2800 Cottage Way
Room E-2215
Sacramento, California 95825-1890

Memorandum

To: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, OR
Regional Director, U.S. Bureau of Reclamation, Mid-Pacific Region, Sacramento, CA
Area Director, Portland Area Office, Bureau of Indian Affairs, Portland OR
Area Director, Sacramento Area Office, Bureau of Indian Affairs, Sacramento, CA

From: Regional Solicitor [David Nawi]
Pacific Southwest Region

Regional Solicitor [Lynn Peterson]
Pacific Northwest Region

Subject: Oregon Assistant Attorney General's March 18, 1996, Letter Regarding Klamath Basin Water Rights Adjudication and Management of the Klamath Project

As requested, we have reviewed the March 18, 1996, letter from Stephen Sanders, Assistant Attorney General, Natural Resources Section, to Martha Pagel, Director, Oregon Water Resources Department (OWRD) (March 18 letter). The March 18 letter responds to a request of the Director of the OWRD for "a description of the types of claims likely to be asserted by the federal government in the Klamath Basin adjudication, and

an analysis of water management authority in the basin pending the completion of the adjudication." We are responding jointly because the March 18 letter addresses issues of concern to agencies within the responsibility of both the Pacific Southwest and the Pacific Northwest Regions of the Solicitor's Office.

The issues raised in the March 18 letter arise in the context of actions by the Secretary of the Interior (Secretary) , acting through the Bureau of Reclamation (Reclamation) , to manage and operate the Klamath Project (Project) and particularly to develop a Project operations plan. In so doing, Reclamation and other Federal agencies with responsibility related to water and wildlife resources, including Indian trust resources, in the Klamath Basin (Fish and Wildlife Service, Bureau of Indian Affairs, and National Marine Fisheries Service) are engaged in a process of consultation with and consideration of the interests of diverse groups, including agricultural water users, Indian tribes, and wildlife interests, regarding Project operations and the development of a plan intended to govern operations pending completion of the Klamath Basin adjudication presently being conducted by the State of Oregon.[1]

The March 18 letter raises issues regarding the authority of the Secretary to manage the Klamath Project pending completion of the adjudication, as well as issues regarding the United States' water rights, including tribal water rights the United States holds in trust, in the Klamath Basin. The March

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[1] Upon completion of the adjudication and pursuant to section 8 of the Reclamation Act of 1902, the Project will be operated in accordance with the outcome of the adjudication, as well as with other applicable requirements, and the operations plan will be revised as appropriate. As discussed throughout this memorandum, many of the issues raised in the March 18 letter arise as a result of Reclamation's need to meet its obligations and responsibilities in operating the Project, the absence of a completed adjudication of the Klamath Basin, and the lack of any other action by the State of Oregon to administer junior water rights in relation to senior unadjudicated water rights in the Basin.

18 letter is in wide circulation and may be read as calling into question the legal basis of various federal actions to manage the Project, including the development of an operations plan. Our conclusions regarding a number of the issues differ from those contained in the March 18 letter. For these reasons, we think it important to set out in general terms our views on the major issues for our client agencies and interested parties.

This memorandum reaffirms long-standing positions of the United States regarding management of water projects for irrigation, wildlife protection, and Indian rights, and builds on the July 25, 1995, memorandum from the Regional Solicitor, Pacific Southwest Region, to the Regional Director, Bureau of Reclamation, Mid-Pacific Region (July 25 memorandum).[2] This memorandum does not attempt to provide a complete legal analysis of all the issues raised by the March 18 letter. Further legal analysis will be presented, as needed, in connection with the adjudication or otherwise.

I. Management of the Klamath Project.

The March 18 letter states that the United States, through development of an operations plan by Reclamation, is asserting that it has the authority to regulate water uses in the Klamath Basin where no such authority exists. March 18 letter, page's 5-7. The United states is not, however, seeking in the operations plan to preempt or supplant the State's role in adjudicating and administering water uses; rather, it is carrying

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[2] The March 18 letter contains several references to the July 25 memorandum, which describes the general rights to the waters of the Klamath and Lost River drainages affected by the operation of the Klamath Project and the obligations of the Bureau of Reclamation to the holders of these rights. We adhere to the conclusions set forth in the July 25 memorandum. This memorandum addresses additional issues not raised in the July 25 memorandum.

out the responsibilities federal law places on it in managing the Klamath Project.[3]

An operations plan is being developed through an open process, including consultation with affected government and other interests and an opportunity for public comment, to arrive at an informed decision regarding Reclamation's operation of the Project pending completion of the adjudication. Reclamation is using this process to review Project operations to assure that they are consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act (ESA) and other requirements mandated by law and within the authority of the Secretary.[4]

The March 18 letter states that it is unclear how water must be managed pending completion of the adjudication and declares that the state will not regulate or administer unadjudicated water rights or water uses. March 18 letter, page 5. The March 18 letter also asserts that the federal government lacks authority to manage any water uses in the basin, even those involving water rights and uses subject to

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[3] The March 18 letter refers to the project operations plan as the Klamath Project Operations Plan or "KPOP." KPOP is no longer the label applied to the operations plan now being developed which will address project management pending completion of the Klamath Basin adjudication being conducted by the State of Oregon. Our analysis of the underlying authorities is applicable to whatever operations plan is ultimately adopted.

[4] The March 18 letter bases its analysis and conclusions on the proposition that the 1905 water rights filing by the United States for development of the Klamath Project is limited to irrigation uses. ("The rights developed under the Reclamation Act and the 1905 Notice must, therefore, be used for the purpose specified in the Act and the Notice, that is, only for irrigation." March 18 letter, page 3.) This memorandum focuses on the issue of authority raised in the March 18 letter. The nature of the Project water rights will be addressed at the appropriate time in the pending adjudication.

federal law. For the reasons set out below, we have a different view.

The Secretary, through Reclamation, must manage and operate reclamation projects developed pursuant to the Reclamation Act of 1902 (43 U.S.C. § 372 *et seq.*, Act of June 17, 1902, 32 Stat. 388) and its amendments and supplements. Specifically, section 10 of the Reclamation Act, 43 U.S.C. § 373, expressly directs the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper" to carry out the reclamation laws. *See United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 212 (9th Cir. 1989). Districts and water users within the project must comply with such actions taken pursuant to section 10 and pursuant to contracts between Reclamation and the districts and water users. *Id.*; *Pyramid Lake Paiute Tribe v. Hodel*, 878 F.2d 1215 (9th Cir. 1989); *Truckee-Carson Irrigation District v. Secretary of Department of Interior*, 742 F.2d 527 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985). The operations plan process and resulting plan are clearly authorized by section 10 of the Reclamation Act of 1902. *See* July 25 memorandum for further discussion.[5]

The federal courts have not hesitated to order the Secretary to fulfill his tribal trust obligations and to comply with the ESA in operating reclamation projects. *See Pyramid Lake Paiute Tribe v. Morton*, 353 F. Supp. 252, 255-56 (D.D.C. 1973). The Secretary, through Reclamation, must operate reclamation projects consistent with vested, fairly implied senior Indian

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[5] *See also Israel v. Morton*, 549 F.2d 128, 132-33 (9th Cir. 1977) (water obtained from a federal reclamation project is not there for the taking by the landowner, but for the giving by the United States, and terms upon which water can be put to use, and manner in which rights to use can be acquired, are only for the United States to fix, and if such rights are subject to becoming vested beyond the power of the United States to take without compensation, such vesting can only occur on terms fixed by the United States).

water rights. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir.), *cert. denied*, 474 U.S. 1032 (1985) (district court did not abuse its discretion in ordering Reclamation to make water available to protect unquantified, unadjudicated treaty-reserved fisheries related water rights); *Pyramid Lake Paiute Tribe v. Morton*, *supra* (Secretary of the Interior "was obliged to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish the result." *Id.* at 256). *Cf. Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) (prior to allocating water from a federal irrigation project among project water users, the Department had to adequately protect the tribe's senior instream flow water rights). *See also Parravano v. Babbitt*, 861 F. Supp. 914 (N.D. Cal. 1994), *aff'd.*, 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996) (Secretary of Commerce properly considered the tribe's federally reserved fishing rights in issuing emergency regulations reducing harvest limits of Klamath River salmon).

Moreover, a specific statutory directive is not needed for Reclamation to manage irrigation deliveries to protect senior tribal water rights. Although the Klamath Tribe's water rights have not yet been quantified in an adjudication, the existence of the Klamath Tribe's rights to the water needed to protect their treaty-reserved hunting and fishing rights (with a priority date of time immemorial) and for agricultural uses has been confirmed by the Ninth Circuit Court of Appeals. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). The Yurok and Hoopa Valley Tribes in California hold unadjudicated water rights which vested at the latest in 1891 and perhaps as early as 1855. *See, e.g., United States v. Adair*, *supra*; *Arizona v. California*, 373 U.S. 546, 600 (1963); *United States v. Winans*, 198 U.S. 371

(1905). *Cf.* Solicitor's Opinion, M-36979, Fishing Rights of the Yurok and Hoopa Valley Tribes (Oct. 4, 1993).[6]

While the March 18 letter asserts that "[o]nly the state has the authority and the regulatory system to establish relative priority dates and enforce the priority system," March 18 letter, page 7, both federal and state courts have jurisdiction in appropriate cases to establish and enforce the priority system. *See, e.g., Cappaert v. United States*, 426 U.S. 126 (1976) and *Winters v. United States*, 207 U.S. 564 (1908). In addition, nothing in the McCarran Amendment, 43 U.S.C. § 666, prohibits the United States from managing and operating its reclamation projects. The priority water rights system is one of the bases upon which reclamation projects are operated. While Reclamation does not adjudicate water rights, the absence of a completed adjudication and Reclamation's legal obligation to manage the project in accordance with law require that Reclamation use its best efforts to operate the project consistent with existing water rights.

The March 18 letter further asserts that regulation in favor of senior tribal, federal, and project water rights may not occur until those rights have been adjudicated and cites *South Delta Water Agency v. U.S. Department of the Interior*, 767 F.2d 531 (9th Cir. 1985), as supporting the proposition. March 18 letter, pages 5-6. However, that case does not address the issue. The Ninth Circuit merely held that, contrary to the State of California's argument, suit cannot be brought pursuant to

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[6] Although tacitly recognizing the fisheries reserved water rights of the Klamath Tribes and the Yurok and Hoopa Valley Tribes, the March 18 letter questions without answering the extent of the Klamath tribal right, and implies that the Yurok and Hoopa Valley Tribes' rights are "paper" rights with no enforceability. March 18 letter, pages 6-7, fn. 4. As discussed above, and in the July 25 memorandum, pages 4-5, in our view the tribes' rights are senior and enforceable against junior uses, and adjustments may be required in how the Klamath Project is operated to be consistent with the tribes' rights.

the McCarran Amendment against the United States for the administration of water rights without a prior general stream adjudication having determined those rights.

The State of Oregon has declined to administer junior rights to protect senior tribal, project, and other federal rights on the grounds that such rights are unknown until the adjudication is complete. However, in the absence of a completed adjudication or other determination of the senior water rights, the project must be operated based on the best available information. For example, the Project irrigation water rights can be reasonably estimated. Similarly, although the tribal instream flow and lake rights are complex, they also may be reasonably estimated; and even though unadjudicated, they are vested, senior rights, and Reclamation must operate the project consistent with those rights. *Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, *supra*, at 1131-32. ("The priority date of time immemorial obviously predates all competing rights" and to ignore this would violate "the fundamental principles of the appropriative system of water rights.")

The March 18 letter also states that users junior to the Klamath Project should provide water to senior rights holders before the Project does so. March 18 letter, page 7. We agree that to do so best comports with the priority system of water rights administration. But the March 18 letter does not address the situation, as in this case, where the State is not protecting senior water rights. Moreover, the March 18 letter offers no avenue or mechanism for effecting calls on junior users. It adopts a hands-off position even though the State is in a better position to deal with junior nonfederal water users.[7] In such

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[7] The March 18 letter sets forth at page 5 Oregon's position that it "neither regulates in favor of nor against unadjudicated water rights." The letter fails, however, to discuss whether the State has authority to regulate junior water rights in relation to senior unadjudicated rights prior to completion

a situation, the Secretary must exercise what authority he has in managing the Project to protect senior water rights and meet requirements of federal law.

We disagree with the assertions in the March 18 letter regarding the water rights for the national wildlife refuges.[8] March 18 letter, pages 5-6. Among others, bases for the refuge water rights include state-based rights perfected by applying project water or return flows to beneficial use, and federal reserved rights to the water unappropriated at the time of the refuges' creation and needed to carry out the refuges' purposes. *See Arizona v. California*, *supra*, at 598.

In sum, the operations plan is not an attempt to regulate water uses in the Klamath Basin. Rather, it reflects Reclamation's effort to exercise its authority to manage the project consistent with all of its obligations, including senior

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of the adjudication, and if so, whether the State should exercise that authority in the Klamath Basin. This has contributed to the demand for Reclamation to prepare an operations plan.

[8] Although the distinction may not be at issue here, we also disagree with the view expressed at page 6 of the March 18 letter that "[as] a technical matter, only 'land set aside from the public domain' may acquire a reserved right" and not land acquired by the United States. *See* Memorandum, Department of Justice, office of Legal Counsel, June 16, 1982, at pages 77-78. In that opinion, the issue of reserved rights for acquired lands was directly addressed:

> Much of the language used by the Court to describe the scope of the reservation doctrine, in fact, it is broad enough to cover all lands set aside for a particular federal purpose, regardless of the prior ownership of the land . . . . [I]n [*United States v. New Mexico*], the Court did not suggest that the reserved rights doctrine applies only to lands that may be formally reserved from the public domain; it recognized rather that the doctrine applies to any land that has been set aside as national forest (which could be reserved or acquire lands). *See* 438 U.S. at 698-99.

Id. at 78.

Indian water rights, contractual obligations and ESA requirements. *See Pyramid Lake Paiute Tribes v. Morton, supra*; *United States v. Alpine Land and Reservoir Co., supra*.[9]

II. The Project Operations Plan is not a "Reallocation" of Klamath Project Water

The March 18 letter states that obligations to Indian tribes and listed species do not provide authority to "reallocate" water absent specific federal authority for the new use and compliance with state law. March 18 letter, page 9; *see also* pages 3, 5, 8, 10, 11. Once again, we believe the March 18 letter mischaracterizes the nature of the issue. The lack of a completed water rights adjudication does not legitimize uses of water that would not otherwise be authorized. Reclamation's actions are intended to result in management and operation of the Klamath Project in a manner which is consistent with and carries out all its legal obligations and responsibilities. Operation of the project to reflect Reclamation's obligations is not a reallocation of water.

The March 18 letter cites several cases to support the proposition that Project water stored under a water right "acquired for irrigation" cannot be used to meet the United States' obligations to Indian tribes and under the ESA. March 18 letter, pages 9-10. In our view, the cases cited either do not apply to the situation at hand or do not support the proposition that the United States may ignore Indian water rights or its obligations under the ESA.

In *Nevada v. United States*, 463 U.S. 110 (1983), the Supreme Court simply held that the United States could not

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[9] For the Newlands Project, discussed in *United States v. Alpine Land and Reservoir Co., supra*, the initial project operation criteria and procedures (OCAP) were issued prior to a final adjudication of water rights in the Newlands Project, while the final OCAP were adopted after the final decree was affirmed. The *Alpine* decision upheld the final OCAP.

ignore the limits of decreed federal reserved or other water rights where all the water rights, including the Indian rights, had already been fully adjudicated. *Nevada* does not address the issue of whether project operations must be consistent with existing senior water rights or the ESA where none of the water rights have been fully adjudicated.

In *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984), *cert. denied*, 470 U.S. 1083 (1985), the court found that the Secretary's decision to operate Stampede Dam solely for the purpose of conserving an endangered species of fish was not arbitrary. Although the court explicitly found that it need not address tribal water rights to reach its decision, the court stated that any asserted obligation of the Secretary to enter into contracts for the sale of project water for municipal and industrial purposes pursuant to the project's authorizing legislation should be considered only when his superseding obligations to the Tribe and under the ESA have been fulfilled. (This case concerned the same Reclamation project that was the subject of *Nevada v. United States*. However, the water rights connected with Stampede Dan are not adjudicated.)

Likewise, in *O'Neill v. United States*, 50 F.3d 677 (9th Cir.), *cert. denied*, U.S. 116 S. Ct. 672 (1995), the court held that the United States was not liable for not furnishing the full contractual amount of water to water users when that amount could not be delivered consistent with the requirements of the ESA and the Central Valley Project Improvement Act, Pub. L. No. 102-575. The court found that the provisions in the contract which precluded federal liability for water shortage were broad enough to include the "mandates of valid legislation."[10]

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[10] Similar shortage provisions are found in Klamath Project contracts.

Reclamation is mandated by the ESA to avoid jeopardizing the continued existence of listed species and to conserve listed species.[11] In addition, individual water users and water districts, as well as Reclamation, are subject to the prohibition in section 9 of the ESA on taking listed species. *See, e.g., United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).

As a final matter, the March 18 letter seen to assume that once the Klamath Basin adjudication is completed and the State begins administering the water rights, the Secretary will no longer need to manage the Project. *See, e.g.*, March 18 letter, pages 2, 4-5. The cases make clear, however, that the Secretary's authority and responsibilities under federal law to manage the Project will continue, concurrent with the requirement to operate the Project consistent with adjudicated water rights. *See Pyramid Lake Paiute Tribes v. Morton, supra* and *United States v. Alpine Land and Reservoir Co., supra*, cases which involved previously adjudicated project water rights.

III. The Klamath Basin Adjudication

The March 18 letter addresses the three general categories of claims the author believes will be resolved in the Klamath Basin adjudication. We do not propose to address these issues now. The United States will make appropriate arguments and set forth in full the federal position regarding these issues in the course of the adjudication. We do, however, make the

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[11] Reclamation is also obligated to confer with the Fish and Wildlife Service or the National Marine Fisheries Service on any action which is likely to jeopardize the continued existence of any species proposed to be listed, and is authorized to take conservation measures to minimize impacts on the proposed species. ESA, section 7(a)(4), 16 U.S.C. § 1536 (a)(4), and section 5(a), 16 U.S.C. § 1534(a).

observations set out below with respect to certain points raised in the March 18 letter concerning the adjudication.[12]

The March 18 letter states that Klamath Project water rights "likely . . . are held by the irrigation districts or perhaps by individual district members" rather than by the United States. March 18 letter, page 4. It is well established, however, that the United States through the Bureau of Reclamation holds the legal title to the water rights for the project. *Nevada v. United States*, *supra*; *Ide v. United States*, 263 U.S. 497 (1924); *United States v. Humboldt Lovelock Irr. Light & Power Co.* 97 F.2d 38 (9th Cir. 1938), *cert. denied*, 305 U.S. 636 (1938); *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1942); *see also* Solicitor's Opinion, M-36966, 97 I.D. 21, Filings of Claims for Water Rights in General Stream Adjudications (July 6, 1989); Solicitor's Opinion, M-36967, 97 I.D. 32, Authority to Provide Water to Stillwater Wildlife Management Area (July 10, 1989). In 1905, the United States, through the Secretary of the Interior, pursuant to the Reclamation Act of 1902 and Oregon law, initiated the appropriation of the amount of water necessary to develop the Klamath Project.

The United States Supreme Court has long held that individual water users who have entered into contracts with the United States to receive project water, hold a beneficial interest in that portion of the project water right actually put to beneficial use. *Nevada v. United States*, *supra*; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Ickes v. Fox*, 300 U.S. 82 (1937). Unlike the United States and individual water users, in

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[12] The March 18 letter was written by an Assistant Attorney General of the State of Oregon who we understand will advise the decision maker in the administrative phase of the adjudication. Several aspects of his letter raise a concern that he appears to have taken positions on issues to be determined in the adjudication before the parties have had opportunity to brief and litigate them.

the typical case irrigation districts hold neither a legal nor beneficial interest in the water right. They have no property interest in the water, nor have they in their own right diverted the water to storage. *Truckee-Carson Irrigation District v. Secretary of the Interior*, *supra*. Moreover, the districts have not put the water to beneficial use and thus do not hold an interest in the water right.

In light of the foregoing, Reclamation is the proper entity to file claims on and hold the water rights for the Klamath Project, 97 I.D. 21, recognizing the beneficial interest of individual water users entitled to use project water for beneficial uses, provided that the use comports with the terms of applicable Reclamation contracts and state and federal law.

Although the March 18 letter does not discuss the subject, there are federally owned lands within the project boundaries that receive project water. The United States is the proper party to file for those water rights in this situation, where the United States holds both the legal and beneficial interests in the lands and the water.

Finally, the United States has control of the project return flows within the boundaries of the project, has the right to use the return flows, and has the right to continue such use. *Ide v. United States*, *supra*. Contrary to assertions in the March 18 letter, the United States Supreme Court did not hold in *Ide* that use of recaptured water had to be the original use; the Court merely held that the recaptured water had to be beneficially used. Thus, we do not believe that *Ide* or subsequent cases preclude the United States from using return flows for uses other than irrigation and domestic purposes.

Similarly, *Jones v. Warmsprings Irrigation District*, 91 P.2d 542 (Or. 1939), is not applicable to circumstances where water remains within the project boundaries and control of the appropriator; that case concerned return flow deemed to be abandoned because there had been no indication of an attempt

to recapture. Finally, the Oregon Supreme Court in *Cleaver v. Judd*, 393 P.2d 193 (Or. 1964), recognized that under Oregon law an appropriator is justified in recapturing waste, seepage, and occasional surface water runoff.

IV. CONCLUSION

Pending completion of the adjudication, Reclamation is authorized and obligated to manage and operate the Klamath Project consistent with all of Reclamation's responsibilities and obligations concerning senior water rights, tribal trust resources, Project water users' contractual rights, the Endangered Species Act and other requirements mandated by law and within the authority of the Secretary. These obligations may be clarified or otherwise affected by the pending adjudication; however, Reclamation will continue to have authority to manage and operate the Project consistent with its obligations after completion of the adjudication.